Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

To: The Commission

COMMENTS

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SUMMARY

The Commission does not have the authority to expand the definition of "unserved household" for the purposes of the Satellite Home Viewer Act, nor is such an expansion necessary or within Congressional intent. Expansion of the definition of "unserved household" would be contrary to statutory interpretation, legislative intent, and the long established policy of localism. It would greatly increase the number of homes defined as "unserved," resulting in duplication of network programming and eventual financial distress for local affiliate broadcasters. Such a result would ill serve the public interest. Rather, the Commission should encourage the use of antenna technology and await Congressional action on a local-to-local satellite service solution.

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To: The Commission

COMMENTS

Entravision Holdings, LLC ("Entravision"), by and through its counsel, and pursuant to Section 1.415 of the Commission's Rules, hereby files its Comments in the above-captioned proceeding concerning the satellite delivery of network signals to unserved households for purposes of the application of the 1988 Satellite Home Viewer Act ("SHVA"). 17 U.S.C. § 119 (1988). In support thereof, Entravision states as follows:

INTRODUCTION

The Commission seeks public comment on matters made relevant by recently filed Petitions for Rulemaking which question the methods for determining whether a household is "unserved" by local network-affiliated television broadcast stations for purposes of the SHVA. In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act- - Notice of Proposed Rule Making, CS Docket No. 98-201, RM No. 9335, RM No. 9345 (1998) (hereinafter the "Notice"). The Petitions were filed by the National Rural Telecommunications Cooperative ("NRTC") and EchoStar Communications

Corporation ("EchoStar"). These Petitions requested, among other things, that the Commission expand its definition of "unserved household" for the purposes of the SHVA.

Entravision submits that the Commission lacks the authority and no showing has been made to permit the expansion of the definition of "unserved household" for purposes of the SHVA. The present definition of "unserved household" is a household that is unable to receive "through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10) (1998). There is no reason for it to be changed therefrom.

Entravision is the licensee of nine full-power and two low-power Spanish language television stations, primarily in the Southwest and West Coast areas, all affiliated with the Univision Network. Entravision is concerned over the impact of the proposed rule on its ability to continue to serve its viewers. Entravision has found from experience that the existing definition of "unserved household" is crucial to maintaining the balance necessary to meet the broadcasting needs of its minority-group audience. Entravision disseminates Spanish-language programming to and serves the needs of Hispanic individuals who rely on Entravision's stations not only for entertainment, but also for news and public affairs programming of importance to them. This specialized programming will suffer greatly from any expansion of the definition of "unserved household" because the duplication of programming that would result from such an expansion would diminish the viewing audience of Entravision's stations. Such a result will inevitably produce a drop in advertising revenue, endangering the financial health of the stations and the ability of Entravision to provide quality Spanish-language broadcasts to its viewers. This result would ill serve the public interest.

ARGUMENT

The Commission Does Not Have The Authority To Alter the Definition of "Unserved Household"

As an initial matter, Entravision submits that the Commission does not have the authority to change the statutory definition of "unserved household" that has already been established by Congress. Without such authority, no change can be made.

In the SHVA, Congress explicitly defined an "unserved household" as one that is unable to receive "through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (*as defined by the Federal Communications Commission*) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10) (1998) (emphasis added). In defining Grade B intensity, Congress explicitly identified 47 C.F.R. § 73.683 of the Commission's Rules as the existing regulation it was adopting. H.R. REP. 100-887, at 26 (1988).

It is well established that once a statute "adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted . . . [s]uch adoption *takes the statute as it exists at the time of adoption* and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent." Hassett v. Welch, 303 U.S. 303, 314 (1938), quoting SUTHERLAND STATUTORY CONSTRUCTION (2nd ed.) 787-88 (emphasis added). See also SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (5th ed.) (remarking that "[a] statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments within the statute").

As such, it is clear that Congress intended for the Commission to adhere to the prediction methodology for determination of Grade B contours then contained in the Commission's rules. Congress made no mention of alternative methodology, including the Longley-Rice methodology, for use in determining coverage. As no agency has the ability to rewrite a federal statute, the Commission cannot alter Congress's clear definition of what constituted an "unserved household."

The SHVA Narrowly Limits the Definition of "Unserved Household"

Even if the Commission has the authority to expand the definition of "unserved household," Congress did not intend such a result. The Commission has shown no such evidence to the contrary.

As direct broadcast satellite ("DBS") service emerged as a new medium for transmitting programming, including network programming, to viewing audiences, Congress realized that satellite retransmission of network broadcasts could damage the policy of free over-the-air television which is served by the delicate balance of the existing network-affiliate system. Local broadcasts of network programming would suffer losses in viewing audiences if forced to compete with duplicate non-local network feeds. In order to protect local network affiliates, Congress enacted (in Section 119 of the Copyright Act) the compulsory license provision of the SHVA.

Normally, under the auspices of the Copyright Act, broadcast copyright owners enjoy the exclusive right to exploit their works and to authorize others to do so. 17 U.S.C. § 106 (1998). The special compulsory license of the SHVA carved out a narrow exception from the Copyright

Act for the satellite carrier industry: the SHVA allowed satellite carriers to deliver network broadcasts to a limited category of dish owners unserved by local network affiliate broadcasters.[1]

This compulsory license in the SHVA was enacted in order to achieve the policy goals of making network programming available to the small percentage of viewing households unable to receive local stations while, at the same time, protecting local network affiliates from duplication of their programming in homes able to receive local stations. Thus, satellite carriers are able to transmit and sell to their customers, in only limited instances, copyrighted television programming created or purchased by the networks. All other customers have no entitlement to network programming of the DBS industry, and should not receive them from DBS services.

In enacting these provisions, Congress strictly limited the compulsory license so that in order to qualify for network programming, customers had to establish their inability to receive local network affiliates over-the-air. 17 U.S.C. § 199(d)(10) (1998); Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2, at 20 (1988) ("[Section 119 is intended] to . . . bring network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship"). Only if there was a substantial basis that a household couldn't receive local programming could they receive it by DBS.

Congress adopted a very specific definition of "unserved household" for the purposes of the SHVA. This definition limited delivery of network programming by satellite to households that are unable to "receive, through the use of a conventional outdoor rooftop receiving antenna,

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[1] There is a long-settled principle of narrow construction of compulsory licenses. "Compulsory licenses are limitations to the exclusive rights normally accorded to copyright owners," and therefore "must be construed narrowly." Cable Compulsory License: Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991). See also Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir.), cert. den. 423 U.S. 841 (1971) (compulsory license "must be construed narrowly, lest the exception destroy, rather than prove, the rule").

an over-the-air signal of grade B intensity (*as defined by the Federal Communications Commission*) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10).[2] Congress deliberately chose the objective, bright line, standard of Grade B intensity so that satellite carriers would not be able to rely on statements by viewers that they "cannot receive an adequate over-the-air television signal" to secure satellite service. Letter from PrimeTime 24 to Michael Remington, House Judiciary Committee (May 19, 1988). Such self-reporting would not provide any meaningful protection for the free over-the-air network-affiliate system which Congress was specifically acting to protect.

Nowhere in legislative history is there any evidence that the definition of "unserved household" was intended to be a changeable one. Quite to the contrary, Congress reaffirmed use of the Grade B contour for establishing an "unserved household" in amending and extending Section 119 of the Copyright Act in 1994. H.R. Rep. No. 103-703, at 13 (1994) (reaffirming "Grade B intensity" as an objective test). It has not been altered since.

Congress clearly understood and intended that only a small percentage of television households would qualify as "unserved households." H.R. Rep. No. 100-887, pt. 1, at 18 (1988). The Commission itself concluded that only "800,000 to 1 million households" are unable to receive local network affiliates. In Re Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 3 FCC Rcd. 1202, 1209 (1988). Congress confirmed its intention to limit the definition of "unserved household" in when it established that satellite carriers engaging in a pattern or practice of violating the

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[2] Grade B intensity, long used by the Commission to define "adequate" or "acceptable" reception, consists of a median signal strength of 47 dBu for Channels 2-6, 56 dBu for Channels 7-13, and 64 dBu for Channels 14-69. 47 C.F.R. § 73.683.

"unserved household" limitation would be put out of the business of retransmitting network signals. 17 U.S.C. § 119(a)(5)(B) (1998).

Even if both the lack of Commission authority and legislative intent could be overcome, any change to the Grade B standard specified in the Commission's rules (which serves as the benchmark for "unserved household") would be inadvisable as it would have a profound effect on the FCC's regulatory system. Many key FCC regulations are based on Grade B contours, and the distance from a television tower to its Grade B contour is determined by the dBu levels specified in Section 73.683(a). See, e.g., Section 76.54(c) ("significantly viewed signals"); Section 76.92(d) (network non-duplication rules); Section 76.156(a) (exceptions to syndicated exclusivity); and Section 76.501(a) (cable TV cross-ownership).

Considering the lack of Commission authority, legislative intent, and the potential secondary effects resulting from any alteration in the definition of Grade B intensity, expansion of the definition of "unserved household" seems ill advised. Congress has repeatedly and emphatically expressed its intent to protect local network affiliates from the importation of duplicative programming. As explained by the D.C. Circuit in rejecting a prior Commission attempt to rewrite a federal statute, Congress "intended a specific scheme for [retransmission of network affiliates]," relying on "[a] balance achieved after careful compromise . . . [the Commission] is not free to circumvent or ignore that balance. Nor can the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities." Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1520 (D.C. Cir. 1995).

Localism, the Underlying Principle of Broadcast Service, Would Be Irreparably Damaged By Expansion of the Definition of "Unserved Household"

An expansion of the definition of "unserved household" will irreparably damage the longstanding Commission policy of localism and free over-the-air television service. As stated in Paragraph 3 of the Notice itself, localism "serves the public interest by making available to local citizens information of interest to the local community (e.g., local news, information on local weather, and information on community events)." Congress has directed the Commission to promote "localism" in the broadcast industry in order "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." Turner Broadcasting System v. FCC, 512 U.S. 622, 663 (1994) (hereinafter "Turner I"). See also United States v. Southwestern Cable Co., 392 U.S. 157, 174 n.39 (1968). No basis exists on which to alter that.

Localism is best served by the present system of broadcast networks and affiliated television stations. The "basic tenet of national communications policy [is] that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" Turner I, 114 S.Ct. at 2470, citing United States v. Midwest Video Corp., 92 S.Ct. 1860, 1870-71, n.27 (1972) (citation omitted). Local broadcast television serves this goal as "an important source of local news, public affairs, programming and other local broadcast services critical to an informed electorate." Turner I, 114 S.Ct. at 2462 (1994) (citations omitted).

Local network affiliates offer free over-the-air programming to local viewers, as opposed to cable or satellite services, which require substantial payment by the viewer. Turner I, 512 U.S. at 663. Local network affiliates provide not only programming offered by the network and

through syndication, but they also offer local programming, often produced by the station itself, which is directly responsive to local needs. H.R. Rep. 100-887, pt. 2, at 19-20 (1988) (stating "historically and currently the network-affiliate partnership serves the broad public interest"). This provision of customized broadcasting, suited to the community, provides a local broadcasting voice, in stark contrast to non-broadcast networks which televise the same material to all viewers nationwide. This service should not be jeopardized.

Advertising revenue is crucial to the survival of local broadcasters. A key source of advertising revenue for local affiliates is the sale of local advertising time during network broadcasts, because network shows attract large audiences. These revenues are crucial to funding local news, weather, locally originated programming, and public affairs programming. Broadcast stations will suffer financially from any expansion of the definition of "unserved household" for the purposes of the SHVA. This is so because expansion of the definition of "unserved household" will result in a greater number of households qualifying as "unserved," enabling satellite operators to take advantage of the SHVA's copyright exemption and broadcast national networks directly to a greater number of homes. This duplication of programming to satellite equipped households will result in a reduction in the viewing audience of the local affiliate, and a corresponding reduction in advertising revenue. Local affiliates, suffering from a drop in revenues, will have to cut back on their local offerings, frustrating the Commission's localism policy. Such a result, especially for the Spanish-speaking audience, which relies on specialty format stations, will be disastrous.

The Commission presently enforces network non-duplication rules in other formats such as on cable systems. 47 C.F.R. § 76.92-76.97 (1996). It noted the following in strengthening these rules in 1988:

> [I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.

Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, 5319 (1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989). Congress also has directed the Commission to apply network non-duplication to telephone companies entering the multichannel video business through open video systems. Telecommunications Act of 1996, P.L. 104-104, § 653(b)(1)(D). In short, the expansion of network duplication, and resulting detrimental effect on localism, which would result from any expansion of the definition of "unserved household," have been condemned in other formats, and deserve similar treatment with regard to the DBS format.

Alternatives Exist to Altering the Definition of "Unserved Household"

Entravision is at a loss to explain why satellite providers argue that expansion of the definition of "unserved household" is necessary to foster competition between satellite and cable television, especially where alternatives exist that would allow reception of local affiliates without upsetting the fragile network-affiliate balance. These alternatives should be pursued before satellite carriers impinge on the ability of local broadcasters to serve their viewers.

Congress did not enact the compulsory license provision of the SHVA in order to foster competition between satellite and cable. Rather, the compulsory license provision of the SHVA was enacted in order to provide network broadcasting to households "unserved" by local network affiliates, while preserving the fragile network-affiliate balance. Alternatives to expanding the definition of "unserved household" exist in order to serve these goals.

One alternative is existing antenna technology, which allows the combination of local over-the-air stations with non-broadcast, satellite programming, so that households not qualifying as "unserved" can receive local broadcast stations. DirecTV itself, the parent of NRTC, one of the petitioners in this proceeding, advertises: "Enjoy local channels and DirecTV too . . . *A new generation of off-air antennas can seamlessly deliver high-quality signals from free local TV broadcasters directly to your DSS system with just a push of your remote.*" DirecTV Website (July 15, 1998) <http://www.directv.com>. Several of the Bell Operating Companies have begun to sell antennas with improved local reception in conjunction with DBS service. *Antennae Attract Viewers to Satellite TV*, WALL STREET JOURNAL, December 1, 1998, at B1, B4. This is one route for DBS operators to take in combining satellite delivery with local network affiliate programming.

Another alternative is local-to-local satellite broadcasting, via a statutory and regulatory scheme where satellite carriers deliver local broadcast signals directly to corresponding local viewers. *Ergen ups local TV ante*, BROADCASTING & CABLE, December 7, 1998, at 48, 50. Such an arrangement was considered and nearly enacted by the last Congress. Hopefully, the next Congress will consider it and enact it into law. Clearly, the remedy is a legislative, not a regulatory, one.

It is clear that the means exist for DBS carriers to provide their customers with network as well as non-network programming. The answer is not in limiting local network affiliates' ability to serve the viewing public. Rather, through technological remedies, or legislative changes that make local-to-local service a reality, the goal of making DBS an even better competitor to cable television can be achieved without harming over-the-air television.

CONCLUSION

Expansion of the definition of "unserved household" would be contrary to statutory interpretation, legislative intent, and the long established policy of localism. Such an expansion would result in violations of the Copyright Act, duplication of network broadcasting, and financial distress for local broadcasters. The Commission should not expand the definition of "unserved household" for the purposes of the SHVA. Rather, the Commission should encourage the use of antenna technology and await Congressional action on a local-to-local satellite service solution.

Respectfully submitted,

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